

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SOLE ENERGY COMPANY,

Plaintiff and Appellant,

v.

PETROMINERALS CORPORATION,

Defendant and Respondent.

G039034

(Super. Ct. No. 00CC06333)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Hugh Michael Brenner, Judge. Affirmed in part and reversed in part. Motion to augment
record. Granted.

Hornberger & Brewer, Nicholas W. Hornberger, Jason H. Gorowitz and
Beverly J. Bickel for Plaintiff and Appellant.

Mazda Butler, Mark N. Mazda and Mark J. Butler for Defendant and
Respondent.

*

*

*

INTRODUCTION

This is the sixth appeal arising out of the underlying lawsuit, *Sole Energy Company v. Petrominerals Corporation*, Orange County Superior Court case No. 00CC06333.¹ The issue in this appeal is whether the judgment that resulted from *Sole Energy III* and *Sole Energy V* bars the claims of Sole Energy Company² against Petrominerals Corporation (Petrominerals) under principles of res judicata or claim preclusion.

We conclude Sole Energy Corporation is not bound by the prior judgment under principles of res judicata because it was not a party or in privity with a party at the trial that led to *Sole Energy III* and *Sole Energy V*. The plaintiffs at that trial were Thomas A. Swaney, Richard F. Borghese, Harwood Capital Corporation (Harwood), and Sole Energy LLC (collectively referred to as Plaintiffs). As a corporation, Sole Energy Corporation's rights and interests are distinct from those of its shareholders. Thus, in *Sole Energy III*, we concluded Swaney, Borghese, and Harwood—Sole Energy Corporation's putative shareholders—could not enforce Sole Energy Corporation's rights in a nonderivative lawsuit, and could not recover the corporation's lost profits as their individual damages. For those same reasons, there was no unity of interest among Sole

¹ *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187 (*Sole Energy I*); *Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199 (*Sole Energy II*); *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212 (*Sole Energy III*); *Sole Energy Co. v. Petrominerals Corp.* (Apr. 5, 2005, G032255) [nonpub. opn.] (*Sole Energy IV*); and *Sole Energy Co. v. Petrominerals Corp.* (Dec. 21, 2006, G036611) [nonpub. opn.] (*Sole Energy V*).

² We refer to Sole Energy Company (the Texas corporation) as Sole Energy Corporation to maintain consistency with the prior opinions and to distinguish it from the never-formed limited liability company also called Sole Energy Company. Here, and in *Sole Energy Co. v. Hodges* (Dec. 4, 2008, G039197) [nonpub. opn.] (*Sole Energy VII*), we refer to the never-formed limited liability company as Sole Energy LLC.

Energy Corporation and Plaintiffs, and Sole Energy Corporation’s interests were not, and could not have been, adequately represented in the prior litigation.

The trial court also granted Petrominerals’ motion for judgment on the pleadings on Sole Energy Corporation’s fraud cause of action. Sole Energy Corporation does not challenge that ruling on appeal. We therefore affirm the judgment in favor of Petrominerals on Sole Energy Corporation’s fraud cause of action, but otherwise reverse the judgment and remand.

FACTS

We recite the facts from our opinion in *Sole Energy III*:

“Thomas A. Swaney is the sole owner and president of Harwood Capital Corporation (Harwood), a subchapter S corporation. Swaney, Harwood, and Richard F. Borghese, a petroleum engineer, were the partners of Sole Energy Company . . . (referred to as Sole Energy [LLC] to distinguish it from Sole Energy Corporation) that was formed sometime in the spring of 1999.^[3] On December 30, 1999, Sole Energy Corporation was incorporated in the State of Texas. Sole Energy Corporation never issued stock.

“HBOC [Hillcrest Beverly Oil Corporation] is an oil and gas company. Kaymor Petroleum Products (Kaymor) owns a gas processing plant abutting HBOC’s wells. Morris V. Hodges was the president of both HBOC and Kaymor. Nevadacor Energy, Inc. (Nevadacor) is a Nevada corporation and apparently owned HBOC’s stock.^[4]

³ “Borghese, Swaney, Harwood, and Sole Energy [LLC] are referred to collectively in this opinion as Plaintiffs. Sole Energy Corporation was the initial plaintiff, but is not a party to this appeal. As explained in *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187 . . . (*Sole Energy I*), the trial court stayed the case as to Sole Energy Corporation when an appeal was taken from an order granting Sole Energy Corporation’s motion for a new trial following summary judgment.

⁴ “The term Defendants collectively refers in this opinion to all the defendants—HBOC, Kaymor, Nevadacor, Hodges, Petrominerals, and [Daniel H.] Silverman—not just the two defendants against whom the case was tried.

“Petrominerals is a California corporation engaged in the acquisition, development, and production of crude oil and natural gas. During the events that are the subject of this case, Hodges was Petrominerals’ president and chief executive officer. Silverman worked as a consultant for HBOC in the capacity of an independent contractor from April 1999 to August 31, 1999. Silverman was Petrominerals’ vice-president of business development and chief operating officer from September 1, 1999 through October 2000.

“While working as a consultant for HBOC, Silverman analyzed a potential joint venture between Petrominerals and HBOC. On July 8, 1999, Silverman prepared a letter to HBOC regarding share valuations resulting from such a joint venture, stating: ‘[T]here is good potential for Petrominerals shareholders and the [HBOC] shareholders to see significant appreciation. This should make the story more convincing for both boards as why this combination would benefit both entities.’

“In July 1999, Borghese and Swaney met with Hodges to discuss acquiring HBOC’s stock and oil- and gas-related assets from Nevadacor. Borghese and Swaney had learned that Hodges was a principal of Petrominerals, that Petrominerals had cash but no other assets, and that Petrominerals intended to use its cash to buy oil and gas properties. So, when Borghese and Swaney met with Hodges, they asked him whether Petrominerals had plans to purchase HBOC. Hodges replied that Petrominerals would not purchase HBOC because (1) there was a conflict of interest, and (2) Petrominerals did not have enough money to buy HBOC. Hodges told Borghese and Swaney to continue the negotiations with Silverman.

“Borghese and Silverman met on August 12, 1999. Silverman told Borghese that Petrominerals had no interest in buying HBOC due to a conflict of interest. Silverman also said he did not know whether Petrominerals had in the past been interested in buying HBOC. But on the day before meeting with Borghese, Silverman had faxed a letter to Hodges, stating: ‘Not to belabor the point with Petrominerals, but I

do think it is possible for P[etrominerals] to purchase [HBOC] if I can go out and bring in some of that mezzanine financing.’ According to Silverman, he did not tell Borghese about that potential transaction because Borghese did not ask about it.

“On December 16, 1999, Borghese submitted a letter of intent to Nevadacor. The letter of intent proposed an entity named Sole Energy Company purchase HBOC’s stock and oil- and gas-related assets from Nevadacor for \$7.5 million. Although Borghese signed the letter of intent on behalf of “Sole Energy Company,” the letter was prepared on letterhead stationery with the name Sole Energy Company, LLC, an entity which never was formed.

“The letter of intent stated it was ‘non-binding’ and included the following language regarding expiration and termination: ‘Except as provided in sections 6 through 11, both inclusive, this letter shall represent a non-binding letter of intent between the parties. This letter of intent shall expire on December 17, 1999, 5:00 CST. Any party may terminate this letter of intent after January 31, 2000, upon written notice to the other parties, or at any time by all parties with their mutual written consent.’ The letter of intent concluded: ‘If the foregoing accurately represents your understanding of our agreement, please indicate by signing in the spaces provided below, and return a copy to us for our records. Upon receipt of a signed copy of this letter of intent, we will instruct our attorneys to begin preparation of a definitive Stock Purchase Agreement.’

“On December 23, 1999, Hodges signed the letter of intent on behalf of HBOC and Kaymor. On December 27, 1999, William Herder signed the letter of intent on behalf of Nevadacor. Sole Energy Corporation was incorporated on December 30, 1999. Borghese intended Sole Energy Corporation to assume Sole Energy Company’s position in the letter of intent, and later drafts of an agreement to purchase HBOC’s stock identify Sole Energy Corporation as the buyer.

“Silverman was not involved in negotiating the terms of the letter of intent and, after the meeting with Borghese in August 1999, did not speak with Borghese or

Swaney until February 3, 2000. On that date, Silverman spoke with Swaney at a trade show and congratulated him on obtaining mezzanine financing for the transaction contemplated by the letter of intent. Neither Borghese nor Swaney had further contact with Silverman.

“On February 18, 2000, Borghese and Swaney received a formal commitment to provide financing for purchasing HBOC. According to Borghese, obtaining financing ‘represent[ed] 80-some percent of putting the deal together.’ Borghese telephoned Hodges to tell him about the financing commitment. The conversation turned into an argument over deal points and ended with Hodges hanging up. On the same day, an attorney for Sole Energy Corporation wrote a letter to Nevadacor’s attorney, stating: ‘[I]t seems to me that our clients are at opposite ends of the spectrum on this transaction. . . . If your clients have changed their minds and if the deal can only go forward on the basis of your comments, one of two things must happen—either there will be no transaction between the parties because of their failure to agree or our clients see the necessity for a very substantial reduction in the purchase price to reflect the increased risks they will have to take in the transaction, as well as increased due diligence costs and delay.’

“On February 22, 2000, Swaney telephoned Hodges to discuss the transaction. During their telephone conversation Swaney and Hodges reached an oral agreement for Sole Energy Corporation to purchase HBOC’s stock and oil- and gas-related assets. Swaney took notes of the conversation but Swaney did not send his notes to Hodges. The notes did not contain a purchase price or a closing date and did not include all the terms of the proposed sale. On February 23, lawyers for Borghese and Swaney prepared a draft stock purchase agreement that did not include a purchase price.

“On February 25, 2000, Nevadacor and Kaymor informed Sole Energy Corporation in writing ‘they wish[ed] to terminate the negotiations and the Letter of Intent dated December 16, 1999.’

“Also in late February 1999, the chairman of Petrominerals’ board of directors asked Hodges ‘if Petrominerals at this juncture should consider making an offer’ for HBOC. Hodges replied, ‘nothing can happen there until after March 1.’ On March 10, 2000, Petrominerals and Nevadacor entered into a nonbinding letter of intent, prepared by Silverman, to sell HBOC’s stock to Petrominerals for \$6.7 million and 200,000 shares of Petrominerals’ stock. Silverman tried to obtain financing for the Petrominerals/Nevadacor transaction from the same bank that had provided Sole Energy Corporation a financing commitment. The bank would not consider providing Petrominerals financing unless it obtained a waiver from Sole Energy Corporation and Borghese. In March 1999, Hodges called Borghese and offered him a job with Petrominerals. Borghese declined.

“The Petrominerals/Nevadacor transaction was terminated because Petrominerals could not obtain the necessary financing. Silverman’s contract with Petrominerals expired about one month later.” (*Sole Energy III, supra*, 128 Cal.App.4th at pp. 219-222.)

PROCEDURAL HISTORY

We recite portions of the procedural history from our opinion in *Sole Energy III*:

“On May 25, 2000, Sole Energy Corporation filed a verified complaint alleging causes of action for intentional interference with contractual relations, intentional interference with prospective economic advantage, fraud, and breach of contract. Defendants successfully moved for summary judgment on the ground Sole Energy Corporation had not been incorporated when the letter of intent was signed and therefore lacked standing to sue.

“Sole Energy Corporation moved for reconsideration of the order granting summary judgment. The trial court deemed the motion for reconsideration to be a motion

for a new trial and granted it. The order granting a new trial is the subject of our opinion in *Sole Energy I, supra*, 128 Cal.App.4th 187.

“Sole Energy Corporation also moved for leave to amend the complaint to add new plaintiffs with standing. The trial court granted the motion, and a first amended complaint was filed December 6, 2001. The first amended complaint added four new plaintiffs: Sole Energy [LLC], Swaney, Borghese, and Harwood. [¶] . . . [¶]

“The trial court stayed the case as to Sole Energy Corporation after Defendants appealed from the order granting the motion for reconsideration. The case proceeded only on the claims of the newly added plaintiffs—Sole Energy [LLC], Swaney, Borghese, and Harwood—and was tried to a jury on their claims against Petrominerals and Silverman for interference with contractual relations, interference with prospective economic advantage, fraud, and conspiracy. During trial, the court granted Silverman’s motion for a nonsuit on the fraud and conspiracy claims.

“The jury returned a verdict in favor of Plaintiffs and against Silverman and Petrominerals in the total sum of \$20,902,416.29, plus interest.” (*Sole Energy III, supra*, 128 Cal.App.4th at pp. 222-223.)

Petrominerals and Silverman filed a total of seven judgment notwithstanding the verdict (JNOV) motions and a notice of intention to move for a new trial. Petrominerals was a party to four of the seven JNOV motions. Those four motions, and the trial court’s resolution of them, are described in *Sole Energy III* as follows:

“*JNOV Motion 2.* Motion by Petrominerals and Silverman as to Swaney and Borghese on all causes of action on the ground there was no evidence either Swaney or Borghese suffered any lost profits. The trial court ruled that Swaney and Borghese had no right to recover lost profits, stating: ‘It appears that the damages offered by plaintiff[s]’ own expert relate solely to damages suffered by Sole Energy, the corporation, and such damages are owed solely to the corporation, not its shareholders.’ The court,

granting the motion, reduced the damages awarded to Swaney by \$11.909 million and reduced the damages awarded to Borghese by \$3.909 million.

“*JNOV Motion 3.* Motion by Petrominerals and Silverman as to Swaney on all causes of action on the ground there was no evidence Swaney suffered any lost profits. Plaintiffs’ expert testified the lost profits were for Borghese and Harwood, Swaney’s S corporation. ‘Based on the state of evidence and authority,’ the court concluded, ‘it appears that the award of lost-profit damages to Swaney, the individual, rather than . . . the corporate S is improper.’ The trial court granted the motion and declined to amend the judgment to award damages to Harwood.

“*JNOV Motion 4.* Motion by Petrominerals and Silverman as to Sole Energy [LLC] on the ground there was no evidence of damages suffered by Sole Energy [LLC]. The court denied the motion.

“*JNOV Motion 5.* Motion by Petrominerals and Silverman as to Sole Energy [LLC] on the ground it never filed a fictitious business name statement as required by California law to maintain a lawsuit. Petrominerals and Silverman do not challenge the trial court’s denial of that motion.” (*Sole Energy III, supra*, 128 Cal.App.4th at pp. 224-225.)

In addition, the trial court granted Petrominerals’ motion for a new trial on the ground the evidence was insufficient to support the jury verdict. (*Sole Energy III, supra*, 128 Cal.App.4th at p. 225.)

Judgment was entered on January 30, 2003. (*Sole Energy III, supra*, 128 Cal.App.4th at p. 226.) The judgment stated, in part, “‘Plaintiffs Thomas A. Swaney and Richard F. Borghese shall take nothing from Defendants Petrominerals Corporation and Daniel H. Silverman.’” (*Ibid.*) Notice of entry of judgment was served on February 11, 2003. (*Ibid.*)

Plaintiffs’ appeal from the judgment resulted in our opinion in *Sole Energy III*. In that opinion, we concluded: “(1) None of the plaintiffs could recover Sole Energy

Corporation's alleged lost profits in this nonderivative lawsuit; (2) plaintiffs failed to present evidence that Silverman interfered with a contractual relationship; and (3) plaintiffs failed to present evidence that Silverman interfered with a prospective economic relationship or engaged in conduct that was wrongful apart from the interference itself. We therefore affirm the granting of JNOV motions, reverse the denial of JNOV motions, and remand with directions to the trial court to strike the punitive damages awarded against Petrominerals. Plaintiffs do not challenge the nonsuit in Silverman's favor on the fraud and conspiracy causes of action, and we lack jurisdiction to address plaintiffs' challenge to the order granting Petrominerals a new trial." (*Sole Energy III, supra*, 128 Cal.App.4th at p. 218.) The disposition stated: "We affirm the grant of JNOV motions 2, 3, and 7, affirm the grant of JNOV motions 1 and 6 on the interference with contractual relations cause of action, reverse the denial of JNOV motion 4, and reverse the denial of JNOV motions 1 and 6 on the interference with prospective economic advantage cause of action. We remand with directions to the trial court to strike the punitive damages awarded against Petrominerals. These rulings eliminate all damages, compensatory and punitive, awarded Borghese, Swaney, and Sole Energy [LLC], and eliminate the \$19,000 in damages awarded to Harwood against Silverman. As a result, the only portion of the verdict remaining is the damages awarded Harwood against Petrominerals. The trial court granted Petrominerals's motion for a new trial, and Harwood failed to appeal from the order granting a new trial. Accordingly, on remand, Harwood's claims against Petrominerals are subject to a new trial. [¶] Respondents Petrominerals and Silverman to recover costs on appeal." (*Id.* at pp. 244-245.)

The disposition in *Sole Energy III* omitted an express direction to enter judgment pursuant to Code of Civil Procedure section 629. In *Sole Energy V, supra*, G036611, we corrected this omission by stating: "[T]he disposition [in *Sole Energy III*] should have expressly directed the trial court to enter judgment in favor of Petrominerals

(against all Plaintiffs but Harwood) and in favor of Silverman (against all Plaintiffs), as Code of Civil Procedure section 629 requires. (All further statutory references are to the Code of Civil Procedure.) We concede the disposition neglected to make that direction. Petrominerals and Silverman did not bring the issue to our attention by petition for rehearing or request for clarification. After remand, Petrominerals and Silverman requested the trial court to enter judgment in their favor in accordance with the disposition. The trial court granted their request, and Plaintiffs appealed from the resulting judgment (the Second Judgment). [¶] We affirm. The Second Judgment accurately reflects *Sole Energy III*'s disposition, and was necessary and proper to fulfill its intent. Indeed, the trial court would have erred if it had not granted Petrominerals and Silverman's request to enter judgment. Our failure to expressly direct entry of judgment pursuant to section 629 does not make the Second Judgment invalid; however, we conclude it does mean Plaintiffs are not subject to sanctions for bringing this appeal."

On May 10, 2006, after remand from *Sole Energy IV*, the trial court granted Petrominerals and Silverman's motion for judgment on the pleadings on Sole Energy Corporation's fraud cause of action. On September 29, 2006, an order was entered dismissing Sole Energy Corporation's fraud cause of action with prejudice. Sole Energy Corporation has not challenged dismissal of the fraud cause of action.

Borghese was deposed as Sole Energy Corporation's person most knowledgeable, and Swaney was deposed as Sole Energy Corporation's chief executive officer. Based on their deposition testimony, Petrominerals and Silverman brought separate motions for summary judgment against Sole Energy Corporation, asserting the judgment barred Sole Energy Corporation from pursuing its claims against them under principles of res judicata or claim preclusion.

The trial court heard the two summary judgment motions separately and initially denied Petrominerals' motion. One week later, the trial court heard Silverman's summary judgment motion and granted it. At the hearing, the court stated it was "sort of

re-thinking” whether Sole Energy Corporation was in privity with Plaintiffs from *Sole Energy III*. Petrominerals’ counsel asked the court if it was reconsidering its denial of Petrominerals’ motion. The court responded, “[w]ell, we can’t go on forever,” and expressed a belief there was privity.

Based on the trial court’s comment, Petrominerals moved for reconsideration of its motion for summary judgment. In reconsidering the motion, the trial court stated it was dealing with “a complicated matter” that “takes a little time to reabsorb” and for that reason “want[ed] to reconsider this matter on its own motion.” After hearing argument, the trial court concluded Sole Energy Corporation was in privity with Sole Energy [LLC] and granted Petrominerals’ motion for summary judgment.

In a written order granting Petrominerals’ motion for summary judgment, the trial court stated: “Here, Petrominerals has a final, on-the-merits judgment against Swaney, Borghese, and Sole Energy [LLC], the informal partnership on the same causes of action that Sole Energy Company, a Texas corporation is now asserting against Petrominerals. . . . [¶] And, Sole Energy Company, a Texas corporation has admitted facts establishing privity between it and the other Plaintiffs. Specifically, *after* the November 17, 2005 judgment was entered, Defendants deposed Borghese and Swaney. Borghese testified as Sole Energy Company, a Texas corporation’s person most knowledgeable and as its President, and Swaney testified as its CEO.”

Sole Energy Corporation filed a notice of appeal from the judgment in favor of Petrominerals and Silverman. We granted Sole Energy Corporation’s later request to dismiss its appeal as to Silverman.

MOTION TO AUGMENT RECORD

On September 3, 2008, after briefing was completed, Petrominerals filed a motion to augment the record with certified copies of volume V of the transcript of the deposition of Borghese and of volume IV of the transcript of the deposition of Swaney.

Petrominerals and Silverman lodged those transcripts with the trial court in connection with their motions for summary judgment, and Petrominerals has lodged them with this court in connection with the appeal. In addition to the motion to augment the record, Petrominerals argues in its respondent's brief that the deposition transcripts are trial exhibits and that Petrominerals transmitted the transcripts to this court in accordance with the rules for transmitting exhibits.

Sole Energy Corporation opposes the motion to augment. It contends Petrominerals unreasonably delayed bringing its motion to augment the record after having failed to submit its own designation of record to include the deposition transcripts. Sole Energy Corporation argues deposition transcripts are not exhibits, and the procedures for transmitting exhibits are inapplicable to deposition transcripts.

The record in a civil appeal includes “[a] record of the written documents from the superior court proceedings” in the form of a clerk's transcript, an appendix, or the original superior court file. (Cal. Rules of Court, rule 8.120(a)(1).) In this case, the parties are using a clerk's transcript. The notice designating documents to be included in a clerk's transcript “must identify each designated document by its title and filing date or, if the filing date is not available, the date it was signed.” (*Id.*, rule 8.122(a)(1).)

Exhibits are covered by California Rules of Court, rule 8.122(a)(3), which states: “Except as provided in (b)(4), all exhibits admitted in evidence, refused, or lodged are deemed part of the record, but a party wanting a copy of an exhibit included in the transcript must specify that exhibit by number or letter in its notice of designation. If the superior court has returned a designated exhibit to a party, the party in possession of the exhibit must promptly deliver it to the superior court clerk on receipt of the designation.” Rule 8.122(b)(4)(A) states the clerk must not copy or transmit to the reviewing court the original of a deposition transcript “[u]nless the reviewing court orders or the parties stipulate otherwise.”

These rules, read together, treat original deposition transcripts as or akin to exhibits that automatically are deemed part of the appellate record. Unlike other types of exhibits, original deposition transcripts may not be copied into the clerk's transcript or transmitted to the reviewing court absent a stipulation of the parties or an order from the reviewing court. Although the original Swaney and Borghese deposition transcripts were not tagged or received as exhibits, they were submitted as evidence in support of Petrominerals' motion for summary judgment and thus served the same purpose as exhibits.

Because the original deposition transcripts were automatically part of the appellate record, Petrominerals neither had to file a notice under California Rules of Court, rule 8.122(a)(2) designating the transcripts nor had to file a motion to augment to include them in the appellate record. We will treat Petrominerals' motion to augment the record as a motion under rule 8.122(b)(4)(A) to transmit the deposition transcripts.

California Rules of Court, rule 8.122(b)(4)(A) does not include a deadline for bringing a motion to transmit deposition transcripts. Rule 8.224(a)(1) requires a party desiring the reviewing court to consider original exhibits to serve and file in the superior court a notice designating such exhibits within 10 days after the last respondent's brief is filed. After that deadline has passed, a party may apply to the reviewing court for permission to send an exhibit to that court. (Cal. Rules of Court, rule 8.224(c).) A party in possession of original exhibits must put them in numerical or alphabetical order and send them to the reviewing court with two copies of a list of the exhibits sent within 20 days after the first notice under rule 8.224(a) is filed. (*Id.*, rule 8.224(b)(2).)

Petrominerals constructively filed its respondent's brief, the only respondent's brief in this matter, on August 4, 2008. Petrominerals did not file and serve a notice under California Rules of Court, rule 8.224(a)(1), but it did lodge the original deposition transcripts with this court on August 13, 2008. Because the superior court did not have possession of the original deposition transcripts, a notice under rule 8.224(a)(1)

was unnecessary to ensure their transmittal to this court. In any event, Petrominerals motion to augment the record would serve as the appropriate postdeadline motion under rule 8.224(c).

Accordingly, we construe Petrominerals' motion to augment the record as a motion under California Rules of Court, rule 8.122(b)(4)(A) and as a motion under rule 8.224(c). Construed as such, we grant the motion. Nonetheless, as we will explain, the deposition transcripts do not establish claim preclusion against Sole Energy Corporation.

DISCUSSION

I. *Law: Principles of Res Judicata (Claim Preclusion)*

Under res judicata or claim preclusion, a prior judgment bars a subsequent lawsuit on the same cause of action between the parties or their privies. (*Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 972-973 (*Busick*).) Claim preclusion prevents relitigation of issues that were decided, or could have been litigated, in the prior lawsuit. (*Id.* at p. 975.) In contrast, collateral estoppel or issue preclusion bars relitigation only of issues actually decided in the prior lawsuit. (*Mooney v. Caspari* (2006) 138 Cal.App.4th 704, 717 (*Mooney*).) Claim preclusion bars a subsequent lawsuit if three elements are established: (1) the prior lawsuit resulted in a final judgment on the merits; (2) the lawsuit sought to be barred is on the same cause of action as the prior lawsuit; and (3) the party against whom claim preclusion is sought was a party or in privity with a party to the prior lawsuit. (*Busick, supra*, 7 Cal.3d at p. 974.)

Sole Energy Corporation concedes the first two elements are met, stating, “[t]herefore, the only element of res judicata in contention for purposes of this appeal is privity, and specifically, whether Sole [Energy] Corporation is in privity with Borghese, Swaney, Sole [Energy LLC] and Harwood, and should be precluded from having an opportunity to appear and present its case at trial against Petrominerals.” The trial court’s

determination of privity is a legal conclusion that we review de novo. (*Mooney, supra*, 138 Cal.App.4th at p. 719.)

“The concept of privity for the purposes of res judicata or collateral estoppel refers ‘to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights [citations] and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is “sufficiently close” so as to justify application of the doctrine of collateral estoppel. [Citations.]’” (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1069-1070.) Due process requires identity of parties or privity to invoke claim preclusion. (*Id.* at p. 1070.)

“““Privity is essentially a shorthand statement that collateral estoppel is to be applied in a given case [assuming the other requirements are satisfied]; there is no universally applicable definition of privity.””” (*Mooney, supra*, 138 Cal.App.4th at p. 719.) Ultimately, the determination whether a party is in privity with another “““depends upon the fairness of binding [the party] with the result obtained in the earlier proceedings in which it did not participate.””” (*Ibid.*)

The four main factors a court examines in determining whether one party is in privity with another for purposes of claim preclusion are: (1) whether there is a “unity of interest” between the party against which claim preclusion is sought and the unsuccessful party in the prior litigation that is sufficiently close to justify application of the doctrine; (2) whether there has been an adequate representation of that interest in the prior litigation; (3) whether application of claim preclusion would offend due process principles; and (4) whether a finding of privity serves the underlying principles of claim preclusion. (*Mooney, supra*, 138 Cal.App.4th at pp. 719-721.)

II. *Application: Sole Energy Corporation Is Not in Privity with Plaintiffs*

Based on the deposition transcripts of Borghese and Swaney, Petrominerals argues there was a unity of interest among Sole Energy Corporation and Plaintiffs in *Sole Energy III* because Sole Energy Corporation's claims are based on the same contract, the same prospective economic advantage, the same proof, and the same "failed deal" that were the subject of *Sole Energy III*. Petrominerals asserts Borghese and Swaney are the only persons who have ever owned Sole Energy Corporation; are the only persons who have ever been officers, directors, or employees of Sole Energy Corporation; are the only persons who have ever acted as Sole Energy Corporation; and hired the same lawyers for Sole Energy Corporation as Plaintiffs hired in *Sole Energy III*.

These assertions do not establish unity of interest sufficient to invoke claim preclusion as a matter of law because a corporation is distinct from its shareholders. A corporation and its shareholders have different rights that may be enforced in different lawsuits. Thus, shareholders may assert their own individual causes of action in a lawsuit, or may assert the corporation's cause of action in a derivative lawsuit.

The distinction between Sole Energy Corporation and its shareholders and their respective causes of action was the driving force in our decision in *Sole Energy III*. In that case, we explained: "Whether a cause of action is derivative or can be asserted by an individual shareholder is determined by considering the wrong alleged. "[T]he action is derivative, i.e., in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets." [Citations.] " . . . The stockholder's individual suit, on the other hand, is a suit to enforce a right against the corporation which the stockholder possesses as an individual." [Citation.]' (*Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 106-107 . . . ; see also *Vega v. Jones, Day, Reavis & Pogue* (2004)

121 Cal.App.4th 282, 297) [¶] Shareholders do not own and have no right to receive corporate profits, except in limited circumstances: ‘It is fundamental, of course, that the corporation has a personality distinct from that of its shareholders, and that the latter neither own the corporate property nor the corporate earnings.’ (*Miller v. McColgan* (1941) 17 Cal.2d 432, 436) Shareholders own stock in the corporation, from which they derive income only upon liquidation of the corporation or the declaration of a dividend by the corporate directors. (*Ibid.*)” (*Sole Energy III, supra*, 128 Cal.App.4th at pp. 228-229.)

For those reasons, we concluded in *Sole Energy III* that Borghese and Swaney—the putative shareholders of Sole Energy Corporation—could not recover their proportionate shares of Sole Energy Corporation’s lost profits. (*Sole Energy III, supra*, 128 Cal.App.4th at p. 232.) Borghese and Swaney might have been able to recover damages suffered individually, such as out-of-pocket expenses or loss in value in their shares of Sole Energy Corporation, but they did not assert or present evidence of such individual damages.⁵ (*Id.* at pp. 233-234.) On that ground, we affirmed the order granting Petrominerals and Silverman’s JNOV motions as to Borghese and Swaney.

As Petrominerals argues, the alleged wrongful conduct appears to be the same in this case as in *Sole Energy III*. But Plaintiffs and Sole Energy Corporation each has different rights arising out of the alleged wrongful conduct, and the nature of their injuries and measure of their damages are different. “When corporate lost profits are sought as damages, the gravamen of the complaint is injury to the corporation, not injury to an individual shareholder.” (*Sole Energy III, supra*, 128 Cal.App.4th at p. 232.)

⁵ Sole Energy Corporation asserts that in *Sole Energy III* we concluded that any damages suffered belonged to it. That is incorrect: We concluded that only Sole Energy Corporation could recover its lost profits, if any. Borghese and Swaney could have recovered damages each suffered as individuals, but they did not allege or present evidence of such damages.

Plaintiffs in *Sole Energy III* could not enforce Sole Energy Corporation's rights in a nonderivative lawsuit, and could not recover the corporation's lost profits as their individual damages. Plaintiffs and Sole Energy Corporation therefore do not share a unity of interest sufficient to invoke claim preclusion. For the same reasons, Sole Energy Corporation's interests were not, and could not have been, adequately represented in *Sole Energy III*.

Invoking claim preclusion against Sole Energy Corporation would not serve the purpose of the doctrine. The doctrine of claim preclusion ““rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation.”” (*Mooney, supra*, 138 Cal.App.4th at p. 717, quoting *Panos v. Great Western Packing Co.* (1943) 21 Cal.2d 636, 637.) Succinctly put, claim preclusion “assures that every party has one day, but no party two days, in court.” (*Busick, supra*, 7 Cal.3d at p. 975.)

Sole Energy Corporation has not had the opportunity to pursue its claims against Petrominerals in court. The trial court stayed the case as to Sole Energy Corporation in 2002 after defendants appealed from the order granting Sole Energy Corporation's motion for reconsideration. The case remained stayed until remand from our decision in *Sole Energy I* in April 2005. Since the case was stayed as to Sole Energy Corporation, the case proceeded to trial only on the claims of Plaintiffs—Sole Energy LLC (the never-formed limited liability company), Swaney, Borghese, and Harwood. As we have explained, Plaintiffs did not bring a derivative lawsuit and therefore could not pursue Sole Energy Corporation's rights or recover its alleged lost profits. Because Sole Energy Corporation has not had the opportunity to pursue its rights in court, applying claim preclusion against it would not serve the doctrine's purposes.

III. *Fraud Cause of Action*

The trial court granted Petrominerals and Silverman's motion for judgment on the pleadings on Sole Energy Corporation's fraud cause action, and that cause of action was ordered dismissed. The final judgment references the dismissal order.

As Petrominerals argues, Sole Energy Corporation presents no argument, authority, or record citations regarding its fraud cause of action. Sole Energy Corporation therefore waived any challenge to dismissal of the fraud cause of action. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 964; see also Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2007) ¶ 9:36, pp. 9-11 to 9-12 (rev. # 1, 2006).) We therefore affirm the judgment in favor of Petrominerals on Sole Energy Corporation's fraud cause of action.

DISPOSITION

The judgment in favor of Petrominerals is affirmed on Sole Energy Corporation's fraud cause of action. In all other respects, the judgment is reversed and the matter remanded for further proceedings. Appellant to recover costs incurred in this appeal.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

ARONSON, J.